

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

In the Matter of	)	
	)	
<b>KOCB Licensee, LLC</b>	)	Facility ID No. 50170
	)	NAL/Acct. No. 0741420034
Licensee of Station KOCB(TV)	)	FRN: 0004970596
Oklahoma City, Oklahoma	)	

**MEMORANDUM OPINION AND ORDER**

**Adopted: April 20, 2010**

**Released: April 21, 2010**

By the Chief, Video Division, Media Bureau:

**I. INTRODUCTION**

1. In this Memorandum Opinion and Order (“MO&O”), we affirm our finding that KOCB Licensee, LLC (“Licensee”), licensee of Station KOCB(TV), Oklahoma City, Oklahoma (“Station”), willfully and repeatedly violated Section 73.670 of the Commission’s Rules (“Rules”) by failing to comply with the limits on commercial matter in children’s programming.<sup>1</sup>

**II. BACKGROUND**

2. On January 31, 2006, Licensee filed an application to renew the license of the Station, File No. BRCT-20060131ABZ (“Application”). Section IV, Question 5, of the license renewal application form, FCC Form 303-S, requests that the licensee certify that it has complied with the limits on commercial matter in children’s programming specified in Section 73.670 of the Rules. Licensee indicated “No” to that certification, explaining in an Exhibit that between October 30, 2000, and October 18, 2003, the Station exceeded the children’s television commercial limits. Of these overages, one was 90 seconds in duration. Licensee also reported that on October 30, 2000, the Station aired a commercial featuring a Pokemon character during the “Pokemon” program. In addition, Licensee stated that on January 4, 2001, it aired a commercial featuring a Pokemon Nintendo game during the “Pokemon” program. Licensee attributed these overages to human error.

3. Licensee also stated that on September 24, 2002, the Station aired a commercial for the Gameboy Advance E-Reader during the “Pokemon” program. According to Licensee’s description, three “Pokemon” game cards were shown for approximately 1.04 seconds. Licensee also indicated that the “Pokemon” game cards were partially hidden and only the letters “MON” were identifiable. Licensee stated that the “Pokemon” characters were not identifiable and were not verbally identified during the commercial. Licensee maintained that the *de minimis* appearance of these cards could not have confused the viewer and that this occurrence does not violate the children’s programming commercial limits rules. Licensee described the corrective measures taken and the policies implemented subsequently to prevent future violations.

4. On May 7, 2007, the Bureau issued a Notice of Apparent Liability for Forfeiture (“NAL”) in the amount of twelve thousand dollars (\$12,000) to Licensee for its violations.<sup>2</sup> In the NAL,

<sup>1</sup> 47 C.F.R. 73.670.

<sup>2</sup> *KOCB Licensee, LLC*, 22 FCC Rcd 8504 (MB 2007) (“NAL”).

the Bureau found that the Station's broadcast of material that exceeded the children's television commercial limits on four occasions, including three program-length commercials, constituted an apparent willful and repeated violation of Section 73.670. On June 6, 2007, in response to the NAL, The CW Network, LLC ("CW"), The WB Television Network ("WB"), and Sinclair Broadcast Group, Inc. (Sinclair) on behalf of the Station submitted a Letter requesting that the Bureau reconsider its findings and conclude that the September 24, 2002 Pokemon Episode was not a program-length commercial, and modify the forfeiture accordingly ("Letter").<sup>3</sup> Further, CW, WB, and Sinclair request that if the Bureau finds that the Pokemon Episode was not a program-length commercial, that the Bureau also find that no host-selling occurred.<sup>4</sup>

### III. DISCUSSION

5. The forfeiture amount proposed in this case was assessed in accordance with Section 503(b) of the Act,<sup>5</sup> Section 1.80 of the Rules,<sup>6</sup> and the Commission's *Forfeiture Policy Statement*.<sup>7</sup> In assessing forfeitures, Section 503(b)(2)(D) of the Act requires that we take into account the nature, circumstances, extent, and gravity of the violation and, with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and such other matters as justice may require.<sup>8</sup>

6. In the Children's Television Act of 1990, Pub. L. No. 101-437, 104 Stat. 996-1000, *codified at* 47 U.S.C. §§ 303a, 303b and 394, Congress directed the Commission to adopt rules, *inter alia*, limiting the number of minutes of commercial matter that television stations may air during children's programming, and to consider in its review of television license renewal applications the extent to which the licensee has complied with such commercial limits. Pursuant to this statutory mandate, the Commission adopted Section 73.670 of the Rules, which limits the amount of commercial matter which may be aired during children's programming to 10.5 minutes per hour on weekends and 12 minutes per hour on weekdays. The Commission also stated that a program associated with a product, in which commercials for that product are aired, would cause the entire program to be counted as commercial time (a "program-length commercial").<sup>9</sup> In addition, the Commission reiterated its long-standing policy against "host-selling," *i.e.*, "the use of program talent to deliver commercials," including "endorsements or selling by animated cartoon characters as well as 'live' program hosts."<sup>10</sup>

7. CW, WB, and Sinclair argued that the September 24 2002 incident did not constitute a program-length commercial because no "Pokemon" characters appeared in the commercial and the commercial for the Gameboy Advance E-Reader did not promote a product related to the "Pokemon" program.<sup>11</sup> Specifically, CW, WB, and Sinclair asserted that the only product promoted in the Gameboy

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<sup>3</sup> The Commission's records reflect that Licensee paid the forfeiture. Therefore, we will treat CW, WB, and Sinclair's Letter as a Petition for Reconsideration.

<sup>4</sup> In view of the determination reached in this Memorandum Opinion and Order, we dismiss this request as moot.

<sup>5</sup> 47 U.S.C. § 503(b).

<sup>6</sup> 47 C.F.R. § 1.80.

<sup>7</sup> *The Commission's Forfeiture Policy Statement and Amendment of Section 1.80 of the Rules to Incorporate the Forfeiture Guidelines*, Report and Order, 12 FCC Rcd 17087 (1997), *recon. denied*, 15 FCC Rcd 303 (1999).

<sup>8</sup> 47 U.S.C. § 503(b)(2)(D).

<sup>9</sup> *Children's Television Programming*, 6 FCC Rcd 2111, 2118, *recon. granted in part*, 6 FCC Rcd 5093, 5098 (1991).

<sup>10</sup> *Id.* at 2127 n. 147, 6 FCC Rcd at 5097; *see also Action for Children's Television*, 50 FCC 2d 1, 8, 16-17 (1974).

<sup>11</sup> In their Letter, CW, WB, and the Station stated that the Gameboy Advance E-Reader is a device that lets users swipe a special card in order to "upload" a game or other information to the Gameboy Advance, a handheld video

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commercial was the Gameboy Advance E-Reader. As part of the portrayal of the Gameboy Advance E-Reader, the Gameboy commercial “briefly showed a special game card with the letters ‘mon.’ The word “Pokemon”, however, was not shown or stated aloud” during the commercial. The “fleeting appearance of these letters would not sufficiently identify the “Pokemon” program to the child audience, argued CW, WB, and Sinclair. Since the commercial promoted a product not related to the “Pokemon” program, CW, WB, and Sinclair submit that the “Pokemon” program did not constitute a program-length commercial.

8. We disagree that the Station’s broadcast of the commercial for the Gameboy Advance E-Reader does not constitute a program-length commercial. The Commission has consistently held that where a commercial announcement is primarily for a product otherwise unrelated to a program, but that announcement also includes references to or offers of products which are related to the program, then the broadcast of that commercial announcement during the program to which the included products relate will render that program a program-length commercial.<sup>12</sup> CW, WB, and Sinclair indicated that one set of available cards to be used with the Gameboy Advance E-Reader, is for a game based on Pokemon creatures. According to CW, WB, and Sinclair, portions of three of these special Pokemon cards were shown during the commercial. We believe that the “Pokemon” game cards shown in the Gameboy commercial relate to the “Pokemon” television program that has the same title. Moreover, we believe that, in the context of the cognitive abilities of young children, there is the potential for confusion between the Gameboy commercial and the “Pokemon” program regardless of whether any “Pokemon” character is depicted given the image of a “Pokemon” game card contained in the commercial and the consequent likelihood that children may associate it with the program, which bears the same title.

9. CW, WB, and Sinclair asserted that the appearance of some of the letters from the word “Pokemon” was “fleeting” and would not sufficiently identify the “Pokemon” program to the child audience. However, it is well-established that the determination as to whether a particular program is a program-length commercial is not dependent on the duration of the appearance of the program-related product in the commercial announcement. The Commission has stated on numerous occasions that, where a commercial announcement includes a product related to the program in which the commercial is broadcast, then the program is a program-length commercial regardless of the duration of the appearance of the program-related product in the commercial.<sup>13</sup>

10. We have considered the Letter submitted by CW, WB, and the Station and the record of this case in light of the above statutory factors, our Rules, and the *Forfeiture Policy Statement*. We conclude that KOCB Licensee, LLC willfully<sup>14</sup> and repeatedly<sup>15</sup> violated Section 73.670 of the Rules, and

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game console. According to CW, WB, and the Station, “[o]ne set of available special cards is for a game based on Pokemon creatures.”

<sup>12</sup> See, e.g., *Max Television of Syracuse, L.P. (WSYT-TV)*, 10 FCC Rcd 8905 (1995); *Scripps Howard Broadcasting Co. (KNXV-TV)*, 9 FCC Rcd 2547 (1994); *Ramar Communications, Inc. (KJTV-TV)*, 9 FCC Rcd 1831 (1994); *Quad Cities Television (KLJB-TV)*, 9 FCC Rcd 1711 (1994).

<sup>13</sup> *UTV of San Francisco, Inc. (KBHK-TV)*, 10 FCC Rcd 10986, 10988 (1995); see also *WPIX, Inc.*, 14 FCC Rcd 9077 (MMB 1999) (commercial for “Spirit of Mickey” home video showing brief image of Donald Duck on cover of video aired during “Quack Pack” program); *Act III Broadcasting License Corp. (WUTV-TV)*, 10 FCC Rcd 4957 (1995), *aff’d*, 13 FCC Rcd 10099 (MMB 1997) (commercial for a fast food restaurant promoting a trip to Disney World as a contest prize contained a brief image of Goofy and aired during the program “Goof Troop”).

<sup>14</sup> Section 312(f)(1) of the Act defines “willful” as “the conscious and deliberate commission or omission of [any] act, irrespective of any intent to violate” the law. 47 U.S.C. § 312(f)(1). The legislative history of Section 312(f)(1) of the Act clarifies that this definition of willful applies to Sections 312 and 503(b) of the Act, H.R. REP. NO. 97-765, 51 (Conf. Rep.), and the Commission has so interpreted the terms in the Section 503(b) context. See *Southern California Broadcasting Co.*, Memorandum Opinion and Order, 6 FCC Rcd 4387, 4387-88 (1991), *recon. denied*, 7 FCC Rcd 3454 (1992) (“*Southern California*”).

that no mitigating circumstances warrant cancellation or reduction of the proposed forfeiture amount.

#### IV. ORDERING CLAUSE

11. Accordingly, IT IS ORDERED, that the Petition for Reconsideration filed by The CW Network, LLC, The WB Television Network, and Sinclair Broadcast Group, Inc. IS DENIED.

12. IT IS FURTHER ORDERED, that copies of this Memorandum Opinion and Order shall be sent, by First Class and Certified Mail, Return Receipt Requested, to KOCB Licensee, LLC, c/o Pillsbury Winthrop Shaw Pittman, LLP, 2300 N Street, N.W., Washington, D.C. 20037-1128, and to its counsel, Kathryn R. Schmeltzer, Esquire, Pillsbury Winthrop Shaw Pittman, LLP, 2300 N Street., N.W., Washington, D.C. 20037-1128.

FEDERAL COMMUNICATIONS COMMISSION

Barbara A. Kreisman  
Chief, Video Division  
Media Bureau

cc: The CW Network, LLC  
The WB Television Network  
Sinclair Broadcast Group, Inc.  
Kathleen Q. Abernathy, Esq.

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<sup>15</sup> Section 312(f)(1) of the Act defines “repeated” as “the commission or omission of [any] act more than once or, if such commission or omission is continuous, for more than one day.” 47 U.S.C. § 312(f)(1). *See also Southern California*, 6 FCC Red at 4388 (applying this definition of repeated to Sections 312 and 503(b) of the Act).